

U.S. Patent Application Serial No. 10/814,679
Second Preliminary Amendment filed August 27, 2004
Inventors: Roy L. Hood and Gary L. Noedel
Our Reference No. 713629.417
Filing Date: March 31, 2004

REMARKS

Rejection Under 35 U.S.C. Section 102(b):

Applicant has amended Claim 1 to recite: "A three-dimensional, unitary, molded, polymeric article comprising a generally planar base section with a first side and a second side and at least one projecting element with a base section and a terminal part, with the at least one projecting element extending from the first side of the base section for the planar base section, wherein **the base section of the at least one projecting element includes a core and a wall,** wherein **the core of the base section of the at least one projecting element and the terminal part of the at least one projecting element are formed therethrough of a first polymer material and the wall of the at least one projecting element is formed of a second polymer material.**"

Support for this Amendment can be found on Page 7, Lines 1-13, of the Applicants' Specification as follows: "The first polymer is supplied at a relatively low pressure so as to fill only the part of the cavity proximate solidifying at the mold wall and remaining generally molten in the core. The second polymer is supplied at a relatively high pressure to **flow through the generally molten core to the terminal parts of the cavity.** Some of the molten first polymer that is advanced toward the terminal end and the final projecting elements generally have a **different polymer core with a first polymer surface at the base section 2 and a second polymer surface at the terminal ends 3.** Accordingly, the cross-section of the base section 2

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is large enough to provide an essentially solid mold wall and a generally molten polymer core. One skilled in the art may determine the dimensions of the cross-section of the base section 2 without undue experimentation depending on the specific polymers used. For example, the molten core may comprise one half of the total cross-section of the base section 2." Therefore, no new matter is added.

Claim 1 recites that: "... wherein the base section **of the at least one projecting element includes a core and a wall, wherein the core of the base section of the at least one projecting element and the terminal part of the at least one projecting element are formed therethrough of a first polymer material and the wall of the at least one projecting element is formed of a second polymer material...**". This provides a marked contrast to Zuiddam et al. (U.S. Patent No. 4,866,808) which was cited under a prior rejection under 35 U.S.C. Section 102. Zuiddam et al. recites: "To achieve the foregoing objects, and in accordance with the purposes of the invention as embodied and broadly described herein, a rollable floor mat is provided comprising: a plurality of **substantially U-shaped plastic profiles each having a longitudinal channel extending the length thereof.** The profiles each have a top, center, and bottom portion, the bottom portion having a first predetermined cross-sectional area, and the center portion having a second predetermined cross-sectional area smaller than the first predetermined cross-sectional area to thereby allow hinged type movement of each U-shaped profile in two directions about the center portion of the profile when pressure is applied to the top portion of the profile. The mat further includes **a plurality of bristle-like filaments fixedly positioned in the**

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longitudinal channels of the U-shaped profiles,.." (Column 2, Lines 10-25). Therefore, Zuiddam et al. merely discloses a plurality of U-shaped channels of a first polymer with bristles of another polymer attached therein while the Applicants' Invention, as claimed, **requires the core and terminal part of at least one projecting element be a first polymer material and the wall of the at least one projecting element be a second polymer material."** Therefore, it is respectfully believed that all the claim limitations must be considered. In re Fine, 837 F.2d 1071, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988). Moreover, it is respectfully believed that "...a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or, inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 814 F. 2d 628, 631 (Fed. Cir. 1987).

In addition, it is respectfully believed, that the United States Patent Office and the Federal Court of Appeals for the Federal Circuit, has steadfastly and properly held the view that for a proper 35 U.S.C. Section 102 rejection, a single reference, i.e., Zuiddam et al., must identically describe each and every element of the rejected claim or else the claim fails as a proper rejection under this statute. In this case, the projecting elements in Zuiddam et al. are of one single polymer. The projecting elements do not have a core and a wall, which are of different polymers as recited in the Applicants' Invention, as claimed, creating a very different structure. It is respectfully believed that a proper application of a reference against a device described and claimed in a patent application requires broadly that the anticipatory device be substantially the same as the anticipated device in **structure**, function and result.

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As a result, Claim 1 is clearly patentable over Zuiddam et al.

Claims 6, 9, 10 and 15 were previously rejected under 35 U.S.C. Section 102 (b) as being anticipated by Zuiddam et al. Claim 6 is now cancelled and this rejection related thereto is respectfully believed to be rendered moot. Since Claims 9, 10 and 15, depend from and contains all of the limitations of Claim 1, Claims 9, 10 and 15, are felt to distinguish from Zuiddam et al. in the same manner as Claim 1.

Therefore, Claims 1, 9, 10 and 15 overcome the previous rejection under 35 U.S.C. Section 102(b) as being anticipated by Zuiddam et al.

Claims 1-3, 5, 7-12, 14 and 15 were rejected under 35 U.S.C. Section 102(b) as being anticipated by Cejka et al. (U.S. Patent No. 6,106,922). Since this rejection specifically excluded previous Claim 6, it is respectfully believed that this rejection is rendered moot. Moreover, Cejka et al. recites: "In FIG. 3, the lower layer 16 forms the base of the sheet 10 and a column of core material for the stems 12. The upper layer 14 forms the surface layer on the base and on the stems. In FIG. 4, the lower layer 16 again forms the base of the sheet 10 and a small portion of the stems 12. **The upper layer 14 forms the surface layer on the base and forms the majority of the stem material.** The lower layer can form any portion of the stems to the point where the upper layer forms the base sheet and the stems, and the lower layer is a continuous smooth sheet that does not form any part of the stems." (Column 4, Lines 56-66).

Therefore, Cejka et al. does not disclose "... wherein the base section of **the at least one projecting element includes a core and a wall**, wherein the core of the base section of the at

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least one projecting element and the terminal part of the at least one projecting element are formed therethrough of a first polymer material and the wall of the at least one projecting element is formed of a second polymer material...." as recited in Applicants' Claim 1. Cejka et al. requires the wall of the base section and the terminal part of the **projecting element being made of the first or same polymer material."** Therefore, it is respectfully believed that for a proper 35 U.S.C. Section 102 rejection, each and every element of the rejected claim must be present in the cited reference. Jamesbury Corp. v. Litton Industrial Products, 756 F.2d 1556, 225 U.S.P.Q. 253 (Fed. Cir. 1985). It is respectfully believed that this is the clear and unequivocal view of the Federal Circuit Court. Atlas Powder v. E.I. DuPont, 750 F.2d 1569, 224 U.S.P.Q. 409 (Fed. Cir. 1984).

Therefore, Claims 1-3, 5, 7-12, 14 and 15 overcome the rejection under 35 U.S.C. Section 102(b) as being anticipated by Cejka et al.

Claims 1, 2, 5, 7, 8, 12, 13 and 15 were rejected under 35 U.S.C. Section 102(b) as being anticipated by Rawlinson (U.S. Patent No. 4,329,196). Since this rejection specifically excluded previous Claim 6, it is respectfully believed that this rejection is rendered moot. Moreover, Rawlinson recites: "In the preferred process **a grass-like sheet of low density polyethylene is fusion bonded to a rigid high density polyethylene substrate.**" (Abstract, Lines 7-10). Therefore, Rawlinson does not disclose "... wherein the base section **of the at least one projecting element includes a core and a wall, wherein the core of the base section of the at least one projecting element and the terminal part of the at least one projecting element are**

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formed therethrough of a first polymer material and the wall of the at least one projecting element is formed of a second polymer material...." as recited in Applicants' Claim 1.

"Rawlinson requires the base section to be of a first polymer material and the core, wall and terminal part of the projecting elements to be of a second polymer material."

Consequently, "the identical invention must be shown in as complete detail as is contained in the... claim." Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1236 (Fed. Cir. 1989). Also, a reference cannot anticipate a claim if there is any structural difference, even if the prior art device performs of the function of the claim. In re Ruskin, 347 F.2d 843, 146 U.S.P.Q. 211 (C.C.P.A. 1965). Moreover, the Court of Appeals for the Federal Circuit has consistently highlighted the importance of considering the subject matter "as a whole" to take into account all limitations of the claims. Carl Schenck, A.G. v. Nortron Corp., 713 F.2d 782, 218 U.S.P.Q. 698 (Fed. Cir. 1983).

Therefore, Claims 1, 2, 5, 7, 8, 12, 13 and 15 overcome the rejection under 35 U.S.C. Section 102(b) as being anticipated by Rawlinson.

Rejection Under 35 U.S.C. Section 103(a):

Claims 4 and 13 were rejected under 35 U.S.C. Section 103(b) as being unpatentable over Cejka et al. (U.S. Patent No. 6,106,922). Since this rejection specifically excluded previous Claim 6, it is respectfully believed that this rejection is rendered moot. Moreover, since Claims 4 and 13 depend from Claim 1 and have all of the limitations of Claim 1, as amended, then

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Claims 4 and 13 overcome the rejection under 35 U.S.C. Section 103(b) as being unpatentable over Cejka et al. in the same manner Claim 1 overcomes the rejection under 35 U.S.C. Section 102(b) as being unpatentable over Cejka et al. Moreover, it is acknowledged by the Examiner that the different pigments in Claim 4 and a specific density of polyethylene in Claim 13 are not disclosed in Cejka et al.

It is respectfully believed that under In re Sang Su Lee, 277 F.3d 1338, (Fed. Cir. 2002), the Federal Circuit found that the Board must not only assure that the requisite findings are made, based on evidence of record, but must also explain the reasoning by which the findings are deemed to support the agency's conclusion. The Federal Circuit rejected the Board's conclusory findings based on "common knowledge and common sense." The Federal Circuit stated: "For judicial review to be meaningfully achieved within these strictures, the agency tribunal must present a full and reasoned explanation of its decision. The agency tribunal must set forth its findings and the grounds thereof, as supported by the agency record, and explain its application of the law to the found facts." The Court has often explained: "The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of 'reasoned decision making.' Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." **In this case, it is respectfully believed that the different pigments in Claim 4 and a specific density of polyethylene in Claim 13 should be disclosed in specific patents or specific publications that provide a hint or suggestion as to their combination**

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with Cejka et al. In this case, what is obvious is that which can only be deduced by a logical step-by-step reasoning process from the premises furnished by the prior art. There is no logical step-by-step reasoning process that can be developed from the premises furnished by the prior art and a showing of a suggestion, teaching or motivation to combine the prior art references is an essential component of an obviousness holding. C. R. Bard, Inc. v. M3 Systems, Inc., 48 U.S.P.Q.2d 1225, 1232 (Fed. Cir. 1998).

Therefore, Claims 4 and 13 overcome the rejection under 35 U.S.C. Section 103(b) as being unpatentable over Cejka et al.

Claims 3, 4 and 11 were rejected under 35 U.S.C. Section 102(b) as being anticipated by Rawlinson (U.S. Patent No. 4,329,196). Since this rejection specifically excluded previous Claim 6, it is respectfully believed that this rejection is rendered moot. Moreover, since Claims 3, 4 and 11 depend from Claim 1 and have all of the limitations of Claim 1, as amended, then Claims 4 and 13 overcome the rejection under 35 U.S.C. Section 103(b) as being unpatentable over Rawlinson in the same manner Claim 1 overcomes the rejection under 35 U.S.C. Section 102(b) as being unpatentable over Rawlinson. Moreover, Claims 3, 4 and 11 recite: "differing pigments." Under In re Sang Su Lee, 277 F.3d 1338 (Fed. Cir. 2002), the Federal Circuit found that the Board must not only assure that the requisite findings are made, based on evidence of record, but must also explain the reasoning by which the findings are deemed to support the agency's conclusion. In this case, it is respectfully believed that there is no support to state that a missing element, i.e., different pigments, is obvious to someone with ordinary skill in the art

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when there is no logical analysis based on the prior art as to why this element can exist in this claimed combination. Consequently, it is respectfully believed that it is improper to apply an “obviousness to try” standard or indulge in hindsight evaluation or reconstruction. See Ecolochem, Inc. v. Southern California Edison Co., 56 U.S.P.Q.2d 1065 (Fed. Cir. 2000).

Therefore, Claims 3, 4 and 11 overcome the rejection under 35 U.S.C. Section 103(b) as being unpatentable over Rawlinson.

New Claim 34 is added, which recites: “A three-dimensional, unitary, molded, polymeric article comprising a generally planar base section with a first side and a second side and at least one first plurality of projecting elements and at least one second plurality of projecting elements, each having a base section and a terminal part, and extending from the first side of the base section for the planar base section, wherein the at least one first plurality of projecting elements, are formed of a first polymer material and the at least one second plurality of projecting elements are formed of a second polymer material.” Support for this Claim can be found on Page 4, Lines 15-18 of Applicants’ Patent Specification, which recites: “As will be discussed below, **individual polymer injection ports** of the polymer block can be customized to supply **multi-color pigments to selected parts**, or all, of **the projecting elements** allowing for creative aesthetic design of patterned articles, especially door mats and flooring materials.” Support for this Claim can also be found on Page 8, Lines 14-15, of Applicants’ Patent Specification, which recites: “Elements with intermediate vents may have **more or less of the two polymers.**” Additional support for this Claim can be found on Page 9, Lines 2-3, of Applicants’ Patent

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Specification as follows: "The article may include **more than two polymers.**" Therefore, no new matter is added.

Claims 36 and 37 have been added to recite: "...wherein the base section contains a pigment that is different from the at least one first plurality of projecting elements" and "...wherein the base section contains a pigment that is different from the at least one second plurality of projecting elements...", respectively. Support for these Claims can be found on Page 8, Lines 18-21 of Applicants' Patent Specification, which recites: "Mold design can permit production of a multi-color mat with at least a minority of said blade-like projecting elements of a different color pigment from the base, or, alternatively, with at least a majority of such elements of a **different color pigment from the base section 2.**" Therefore, no new matter is added. Claims 35, 38-46 have been added which comport with Claims 2, 5, 7-14 but depend directly or indirectly from Claim 34. Therefore, no new matter has been added. It is respectfully believed that new Claims 34-46 are patentable over the known prior art.

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Therefore, it is now believed that all of the pending Claims 1-5, 7-15 and 34-46 in the present application are in condition for allowance. Favorable action and allowance of the Claims is therefore respectfully requested. If any issue regarding the allowability of any of the pending Claims in the present application could be readily resolved, or if other action could be taken to further advance this application such as an Examiner's Amendment, or if the Examiner should have any questions regarding the present amendment, it is respectfully requested that the Examiner please telephone Applicants' undersigned attorney in this regard.

Respectfully submitted,

Dated:

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